

Service Date: March 20, 2001

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

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IN THE MATTER OF MACKENZIE	)	TRANSPORTATION DIVISION
DISPOSAL, INC., PSC No. 9265,	)	
Complaint by Montana Solid Waste	)	DOCKET NO. T-00.4.COM
Contractors and Browning-Ferris	)	
Waste Systems of Montana	)	ORDER NO. 6492a

FINAL ORDER

Introduction

1. On January 14, 2000, the Montana Solid Waste Contractors, Inc. (SWC), and Browning-Ferris Waste Systems of Montana (BFI) jointly filed a complaint before the Public Service Commission (PSC) against MacKenzie Disposal Service, Inc. (MacKenzie). On January 31, 2000, SWC and BFI filed an amended complaint. SWC is an association of Class D (solid waste) motor carriers. BFI is a Class D motor carrier operating in various service areas in Montana, including in the Billings area. MacKenzie is a Class D motor carrier operating in the Billings area.

2. SWC/BFI challenge the validity of the Class D authority held by MacKenzie and MacKenzie's operations under that authority. The PSC has not issued a notice of the complaint to MacKenzie. The PSC initially had and still has concerns related to the validity of the claims made by SWC and BFI and the appropriateness of MacKenzie as a defendant in regard to those claims. However, the PSC has, as of March 22, 2000, directed a letter to MacKenzie advising that a SWC/BFI had been filed and could affect the Class D authority held by MacKenzie. MacKenzie has participated in the SWC/BFI complaint proceeding through special appearances.

3. Shortly after SWC/BFI filed the amended complaint, in relation to the SWC/BFI claim pertaining to scope of the MacKenzie authority, it became apparent to the PSC that a significant difference of opinion existed between SWC/BFI and the PSC regarding proper application of a PSC rule pertaining to the Class D "landfill closure provision" (*ARM 38.3.130*).

On March 16, 2000, the PSC commenced rulemaking (*PSC Docket No. L-00.2.2-RUL*) to resolve the conflicting interpretations. On March 23, 2000, the PSC denied a SWC/BFI motion for PSC compliance with PSC complaint procedures and stayed further action on the SWC/BFI complaint pending the rulemaking. On July 27, 2000, the PSC concluded the rulemaking, amending its landfill closure rule in a way confirming an interpretation of the PSC's landfill closure rule favorable to MacKenzie in relation to the SWC/BFI scope-of-authority claim. SWC, BFI, and Mackenzie (as well as others) participated in the rulemaking.

4. On October 19, 2000, the PSC issued a proposed order (*PSC Order No. 6492*) dismissing the SWC/BFI complaint on the PSC's own motion. Through the exceptions (or objections) process applicable to PSC proposed orders Mackenzie has supported the proposed order and SWC and BFI have objected to the proposed order. Briefs have been filed. On February 5, 2001, the PSC held oral argument on the exceptions. This final order, affirms the result of the proposed order (i.e., dismissal of the SWC/BFI complaint), but replaces the proposed order in its entirety.

## Discussion

### Issues

5. The issues include two procedural issues and four substantive issues. The procedural issues are whether the PSC has the authority to dismiss the SWC/BFI complaint, or any claim within that complaint, on its own motion and whether MacKenzie is a proper entity to defend against any or all claims made by SWC and BFI. The substantive issues are whether the MacKenzie authority was originally issued in violation of Montana laws applicable to the 1977 spin-off of property authorities to solid waste authorities, whether the authority held by MacKenzie is in compliance with use-it-or-lose-it laws governing Class D carriers, whether MacKenzie has met the PSC requirement to commence actual operations within 30 days of approval of a transfer of authority, and whether MacKenzie's present operations under its authority are outside the lawful scope of that authority.

Dismissal of a Complaint on the PSC's own Motion

6. The PSC determines that it can dismiss the SWC/BFI complaint and any or all claims within that complaint on its own motion. SWC and BFI suggest that the PSC cannot dismiss the complaint, apparently arguing the PSC is analogous to a court and must act accordingly in regard to complaints. Particularly, SWC and BFI seem to suggest that the PSC, as is the common practice with courts, should not dismiss complaints on its own motion, but should act only upon motion by the parties to the proceeding. SWC and BFI argue that the PSC is bound by Rule 12(b)(6), M.R.Civ.P., and standards developed in accordance with that rule, in regard to dismissal of claims. SWC and BFI also argue that the PSC has no choice but to issue a notice of complaint to MacKenzie because a PSC procedural rule applicable to complaints (*ARM 38.2.2104*) requires it.

7. The SWC/BFI position is incorrect. The PSC is not a court, it is a regulatory agency. The PSC has regulatory authority over all participants in this present matter and all events which are a subject of the complaint. *See, e.g., § 69-12-201, MCA*. The PSC, as regulator, has powers of investigation of all matters it has authority over, has been a participant, if not the central figure, in many of the events upon which the complaint is based, and is the custodian of the official records of the events which are in issue. Courts generally do not have these types of regulatory powers, are not a regulator of the parties involved, have not been an integral part of the events leading up to a complaint, and do not maintain the official records of those events.

8. In addition, the PSC complaint procedure is much different than typical court complaint procedures. Complaints are filed with the PSC, but it is the PSC that determines if a particular complaint (or claims made within the complaint) should be issued to the named defendant. *ARM 38.2.2104*. The purpose of this policy is to ensure that the complaint is something the PSC can or should proceed with on jurisdictional grounds. However, the PSC will, during its review of complaints prior to determining whether the complaint should be issued, remain alert to other matters regarding a particular complaint which may warrant further PSC scrutiny. PSC procedural rules specifically allow a PSC waiver of any or all procedural

rules, including complaint rules, for good cause and as justice may require. *ARM 38.2.305*. To the extent any PSC rule can be interpreted as compelling the PSC to issue a notice of the SWC/BFI complaint in this instance, that rule is hereby waived for good cause and in the interests of justice. In regard to the SWC/BFI arguments concerning the application of Rule 12(b)(6), M.R.Civ.P., such rule does not apply to PSC proceedings, but even if it did and standards for dismissal developed in regard to it were applicable, the PSC could not conclude that the SWC/BFI complaint is either well-pleaded or that confining analysis to the pleaded facts would not result in dismissal.

9. Two of the four claims made by SWC/BFI (i.e., the initial-grant claim and the use-it-or-lose-it claim) are in whole or in substantial part based on absolutely ancient events under any reasonable legal standard, events which MacKenzie had nothing to do with and likely has limited, if any, knowledge. One of the remaining claims (i.e., scope-of-authority claim) has clearly been resolved by PSC rulemaking and, as matter of law, the SWC/BFI claim could not prevail under the facts pleaded. The remaining SWC claim (i.e., compliance claim) is based on a SWC/BFI misunderstanding of the law applicable and also could not prevail under the facts pleaded. The PSC determines that it has the power, as a regulatory agency, to dismiss a complaint or individual claims within a complaint on its own motion and will do so when it is appropriate. It is appropriate in this instance regarding the SWC/BFI complaint against MacKenzie. Furthermore, the above aspects of the SWC/BFI complaint are so apparent that issuing a notice of the SWC/BFI complaint to MacKenzie would make no sense from a legal or practical standpoint, and in all likelihood would merely result in Mackenzie making motions regarding the same concerns.

#### MacKenzie as a Proper Defendant

10. MacKenzie would be the proper entity to defend against a complaint or any valid claim within a complaint before the PSC in regard to an act of MacKenzie, while a motor carrier and as a motor carrier, if the facts and law pleaded reasonably indicate that the act is in violation of a PSC rule or order or any statutory provision administered by the PSC. *See, generally, § 69-*

*12-210, MCA.* MacKenzie has only been a motor carrier subject to the PSC's authority since the later part of 1999, when MacKenzie acquired the Class D authority in issue. The events or violations alleged by SWC/BFI occurring since MacKenzie became a motor carrier are certainly ones MacKenzie has at least some measurable degree of responsibility. However, in regard to the SWC/BFI initial-grant claim MacKenzie played no role, had no responsibility, is in no position to be called upon as defendant, and has violated nothing in relation to PSC rules, orders, or statutes administered by the PSC. In regard to the SWC/BFI use-it-or-lose-it claim MacKenzie was only involved and had responsibility for compliance during a brief period beginning in the later part of 1999. For all times prior to that period MacKenzie violated nothing in relation to PSC rules, orders, or statutes administered by the PSC. MacKenzie, being a motor carrier at the time and acting as such, would have a responsibility to defend against the SWC/BFI use-it-or-lose-it claim regarding the later part of 1999 and also the claims made by SWC/BFI regarding scope of authority and post-transfer-compliance, if these claims were otherwise sound, which they are not.

#### Validity of MacKenzie Authority in Regard to Initial Grant of Authority

11. The PSC has regulated Class D motor carriers as a separate class of motor carrier since the mid-1970s. In the mid-1970s the Montana legislature first enacted Class D motor carrier laws. Prior to that time, for-hire transportation of solid waste, if seriously regulated at all, was regulated through the PSC's then-existing regulation of for-hire transportation of property. Class D regulation in Montana started with a property-authority spin-off procedure. Many existing Class D motor carrier authorities are mid-1970 spin-offs from property authorities. Essentially, the spin-off process created by the legislature allowed a property carrier to obtain Class D authority identical to the carrier's underlying property authority, if the carrier could demonstrate that it had been engaged in the transportation of solid waste. MacKenzie's authority, held by Suhr Transport (Suhr) in the mid-1970s, originated as a spin-off authority.

12. SWC and BFI claim the authority now held by MacKenzie was originally issued in violation of laws which applied to the spin-off of property authorities. The PSC determines

that this SWC/BFI claim should be dismissed, as the SWC/BFI claim is invalid based on timing and MacKenzie is not the proper entity to defend against the claim. In support of their initial-grant claim SWC and BFI reference *Matter of Galt*, 196 Mont. 534, 644 P. 2d 1019 (1982), in which a Class D authority was invalidated because originally issued in violation of law. There is no reasonable comparison of *Galt* to the present case. In *Galt* the initial-grant claim was raised within ten months of the initial grant in a transfer proceeding commenced by the carrier to whom the initial grant was made. In regard to the MacKenzie authority almost 25 years have passed and the authority has changed ownership several times.

13. The MacKenzie authority is based on a property authority issued in 1929 to Great Falls Transfer and Storage Company, which later became affiliated with Suhr and later became Suhr. In 1977 all or a part of the underlying property authority held by Suhr was spun-off to create the Class D authority now in issue. Since its creation in 1977 the Suhr Class-D authority has been transferred several times. PSC records show that the authority was first leased and then transferred from Suhr to Jim's Excavating Service, Inc., in 1991, then transferred to WWSS Associates, Inc., dba Big Sky Industrial, in 1993, and then transferred to MacKenzie in 1999. From 1977 to the present the authority has been deemed valid by the PSC, the initial owner, and the three subsequent owners, including MacKenzie. During this time the validity of the authority in regard to events surrounding its initial grant has not been questioned or challenged in any way.

14. Under these circumstances the PSC decides that it will not attempt any procedure to determine the validity of the authority in regard to the initial grant. Such determination must ultimately be based on the reconstruction of events, if accurate reconstruction is even possible, occurring nearly one-quarter of a century ago, events which are now ancient. Furthermore, even if it could be determined following such procedure that the authority might have been issued in violation of applicable laws, in no reasonable context under the circumstances could invalidation of the authority based on the initial grant be viewed as fair, equitable, or just from any practical or legal standpoint. The proper time for SWC, BFI, or any other person to challenge the initial grant of the authority is long past.

15. The PSC also determines that MacKenzie would not be the proper entity to defend against this SWC/BFI initial-grant claim. MacKenzie has relatively recently (late 1999) acquired the authority through a transfer approved by the PSC over protest of BFI in PSC Docket No. T-99.25.ST. At the time of the transfer all information reasonably available to MacKenzie, including records of the PSC, demonstrate that the authority has been deemed valid and has remained valid since its creation through the spin-off process almost 25 years ago. MacKenzie had nothing to do with the initial grant and is in no way responsible for anything related to the creation of the authority.

Validity of Mackenzie Authority in Regard to Use-It-or-Lose-It Requirements

16. Montana's Class D motor carrier regulation requires that a Class D carrier remain engaged in the transportation of solid waste or risk invalidation of authority (Class D "use-it-or-lose-it" provision). *See, § 69-12-214(2), MCA, and related rules, e.g., ARM 38.3.1203.* SWC and BFI claim that the authority held by MacKenzie has not complied with the Class D the "use-it-or-lose-it" requirement. The PSC determines that this SWC/BFI claim should be dismissed, as the SWC/BFI claim is invalid in part based on timing, in remaining part on the merits, and MacKenzie would not be the proper entity to defend against a substantial part of the claim in any event.

17. A Class D motor carrier may not possess a Class D certificate or operate as a Class D carrier unless the carrier is actually engaged in the transportation of garbage on a regular basis as a part of the carrier's usual business operations. *§ 69-12-214(2), MCA.* This statute was enacted in 1979 and implemented by PSC rules the following year. In accordance with PSC rules there is a presumption that a Class D carrier is actually engaged in the transportation of garbage on a regular basis as a part of usual business operations if the carrier demonstrates that service has been provided to at least 20 customers per month during each month of a calendar year or that service has generated at least \$5,000 gross revenue during the calendar year. *ARM 38.3.1203.* This rule also provides that the failure of a Class D carrier to demonstrate at least \$5,000 in gross revenues raises no presumption in favor or against the carrier retaining its

certificate, but the carrier will be evaluated on a case-by-case basis pursuant to another rule (*ARM 38.3.1204*). That rule allows a verified statement describing the circumstances under which the carrier believes it should be allowed to retain its certificate. A carrier may file before the PSC a verified statement of circumstances (e.g., seasonal operations) which the carrier believes should allow an authority to be retained even though the minimum requirements for operations are not met. *ARM 38.3.1204*. Carriers are required to file an annual report related to the above requirements. *ARM 38.3.1205*. PSC policies applicable to all carriers also apply in evaluation of Class D use-it-or-lose-it situations. One policy developed in the early 1990's because of problems arising in PSC administration of a then-recent legislative creation (repealed soon following) of a Class E (log hauler) motor carrier authority and an accompanying annual report requirement with calendar year use requirements similar to the Class D use-it-or-lose-it provision. The PSC at that time determined a carrier acquiring an authority through grant and both carriers involved in a transfer of an authority would not be required to meet the minimum calendar-year use requirements in the year of the grant or transfer because the carrier and neither carrier controlled the authority for the entire calendar year. This policy was applied to Class D carriers as well. Dated or current, the above statutes, rules, and policies are the ones that have been, and remain, in effect and have been applied equally to all carriers and are what must be applied in evaluation of use-it-or-lose-it in regard to the authority held by MacKenzie.

18. The SWC / BFI claims reference use-it-or-lose-it events as far back as 1981. During this entire period the authority has been deemed in compliance by the PSC, the initial owner of the authority, and the three subsequent owners, including MacKenzie, and the validity of the authority in regard to use-it-or-lose-it requirements has not been previously questioned or challenged. The PSC determines that there could be limitations on the period of time reviewed regarding this claim. Ignoring whether MacKenzie is even the proper defendant in regard to the claim, even if it could be established that owners of the authority did not meet the Class D use-it-or-lose it requirements in years prior a certain point (e.g., five years ago), in no reasonable context under the circumstances present could invalidation of the authority on that basis be viewed as fair, equitable, or just from any practical or legal standpoint.



19. However, it now appears that SWC and BFI are focusing the allegation of violation on calendar years 1993, 1997, and 1999 and the PSC will review each of those years. For all other calendar years the annual reports pertaining to the authority held by MacKenzie include revenues above the \$5,000 minimum required and the only SWC/BFI comment regarding years other than 1993, 1997, and 1999 is that the annual reports include no monthly list of customers. However, a list of customers is not required in regard to a showing based on annual revenues, as the customers per month and annual revenues requirements are alternative requirements. *See, ARM 38.3.1203*. The PSC agrees that the annual reports pertaining to the MacKenzie authority show no revenues during calendar years 1993, 1997, and 1999, but the absence of revenues during a calendar year does not necessarily mean that the carrier is out of compliance with the Class D use-it-or-lose-it requirement, as there is excusable inactivity.

20. For the calendar year 1993 the authority now held by MacKenzie produced no income. However, compliance with PSC requirements was met. A verified statement (alternative to proving use) based on the holder (then WWSS) acquiring the certificate in September 1993 was filed. The verified statement did not need to be filed, as PSC policy is that neither carrier has to meet the minimum activity requirements during a transfer year, because the reporting requirement is by calendar year and neither carrier controls the authority for a calendar year. The holder of the certificate prior to the transfer was Jim's Excavating. After the transfer it was WWSS. WWSS held other motor carrier authority (Class C) and compliance (e.g., obtaining insurance) was not in issue following the transfer. The PSC has no records of whether operations were or were not commenced within the required 60 days of transfer, the PSC has never routinely investigated this aspect of compliance, no complaint has been made, and the PSC assumed, through the verified statement's reference to "had no business" that the carrier was engaged in business, but had no customers. In the three following years WWSS generated at least the minimum required revenues and so reported. At the time SWC and BFI filed the complaint against MacKenzie the facts underlying this SWC/BFI claim were at least six years old. MacKenzie had nothing to do with the authority at that time.

21. For calendar year 1997 the annual report includes no revenues. However, compliance with PSC requirements was met. The next previous owner of the MacKenzie authority, WWSS, requested suspension of the authority commencing December 1, 1997 (extending to June 1, 1998). SWC and BFI note that WWSS had conducted no operations in the preceding eleven months of 1997 and compute the total inactivity, inactivity plus period of suspension, as 17 months. However, during the reported year 1997 the PSC had granted a suspension, which it has authority to do pursuant to § 69-12-404, MCA. It is PSC policy pertaining to Class D carriers that annual reports pertaining to a reported year during which there was a suspension do not have to meet the calendar year minimum revenue requirements. Although reports for the year of suspension are required, for the purpose of maintaining a complete history of the authority, the revenues reported, if any, are partial-year and are not required to meet the calendar year minimum standards and may demonstrate zero revenues for the year. In any event, for reported year 1997 the PSC accepted a verified statement in lieu of the minimum standards, which the PSC may do by rule. *ARM 38.3.1204*. The verified statement reflected the carrier's suspension, relocation, and reorganization efforts. The extension of the suspension into 1998 makes no legal difference because in calendar year 1998 the authority was used (in the later half) and the Class D use-it-or-lose-it compliance was met. Again MacKenzie had nothing to do with the authority at that time.

22. For calendar year 1999 the annual reports include no revenues, but in that year the authority changed ownership (from WWSS to MacKenzie). PSC policy is that "calendar year" in *ARM 38.3.1203* and *38.3.1205* means the entire calendar year. Although reports for the year are required from the transferor and the transferee, for the purpose of maintaining a complete history of the authority, the revenues reported, if any, are partial-year and are not required to meet the calendar year minimum standards and may demonstrate zero revenues for the year. Calendar year 1999 is the only year MacKenzie was involved with the authority and would have an obligation to defend against valid claims concerning 1999. However MacKenzie would not have to report revenues for 1999 because 1999 is a transfer year.

MacKenzie Commencing Actual Operations

23. In the complaint against MacKenzie, SWC and BFI assert that MacKenzie was required to begin actual operations within 30 days of the grant of authority, but did not do so. The PSC determines that this SWC/BFI claim should be dismissed, as the SWC/BFI claim is based on a misunderstanding of the applicable law. PSC rules do not require a motor carrier to commence operations within 30 days of a transfer of authority. PSC rules require that within 30 days of the mailing of notice of PSC approval of a transfer the carrier must make a compliance filing. *ARM 38.3.602*. Then, within 30 days of the carrier's compliance filing the carrier must commence actual operations. *Id.* PSC records show that the PSC letter approving the transfer to MacKenzie was mailed to MacKenzie on November 22, 1999. PSC records show that MacKenzie met compliance within the required 30 days, by filing vehicle registration on December 14, 2000, and filing proof of liability insurance on December 22, 1999. The SWC/BFI amended complaint itself states, upon information and belief, that MacKenzie's operations commenced a few days after January 14, 2000. This is before January 22, 2000, the date for compliance, and is in compliance with the PSC rule on commencing operations.

MacKenzie Operations and Scope of Authority

24. At the time of the Class D spin-off process (mid-1970s) there was an awareness in the PSC and the industry about possible restrictions or closure of existing landfills due to environmental concerns. The PSC determined that a provision allowing transportation of solid waste to other landfills, landfills which otherwise could not have been reached in accordance with the strict geographical bounds of the underlying authority, should be inserted in Class D authorities. Most Class D authorities have a landfill closure provision. The MacKenzie authority includes a landfill closure provision.

25. The SWC / BFI complaint against MacKenzie includes a claim that MacKenzie's operations in the Billings area are not within the scope of the authority held by MacKenzie and are therefore not lawful operations. The PSC determines that this SWC/BFI claim should be dismissed. This SWC/BFI claim centers on a dispute over the meaning and effect of the landfill

closure provision as it applies to authorities having required termination points, which MacKenzie's authority does. This dispute has been resolved since the filing of the SWC/BFI complaint through PSC rulemaking on alternative proposed amendments to the PSC's existing landfill closure rule (*ARM 38.3.130*). In that rulemaking the proposed alternative amendment adopted by the PSC resulted in an interpretation of the landfill closure provision in such a way that MacKenzie's operations complained of by SWC and BFI are not beyond the scope of the MacKenzie authority.

#### ORDER

IT IS HEREBY ORDERED that the January 14, 2000, complaint by the Montana Solid Waste Contractors, Inc., and Browning-Ferris Waste Systems of Montana against MacKenzie Disposal Service, Inc., including as amended January 31, 2000, is dismissed.

Done and dated this 7th day of March, 2000, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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GARY FELAND, Chairman

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JAY STOVALL, Vice Chairman

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BOB ANDERSON, Commissioner

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MATT BRAINARD, Commissioner

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BOB ROWE, Commissioner

ATTEST:

Rhonda J. Simmons  
Commission Secretary

(SEAL)

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Final Order, Number 6492a, in Docket T-00.4.COM has today been sent to all parties listed below.

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MAILING DATE: March 20, 2001

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FOR THE COMMISSION

### FIRST CLASS:

MacKenzie Disposal Service, Inc.  
980 Gold Dust Circle  
Billings, MT 59105

Jerome Anderson  
Attorney at Law  
PO Box 866  
Helena, MT 59624

BFI Waste Systems of North American, Inc.  
a Delaware Corp.  
1501 Rodgers  
PO Box 8449  
Missoula, MT 59802

Frank C. Crowley  
Doney & Crowley, Bloomquist & Uda, PC  
PO Box 1185  
Helena, MT 59624-1185

G. Steven Brown  
Attorney at Law  
1313 11<sup>th</sup> Avenue  
Helena, MT 59601

Montana Waste Contractors Association  
34 S. Last Chance Mall #1  
Helena, MT 59601

### AS ITS INTEREST MAY APPEAR:

Montana Consumer Counsel  
PO Box 201703  
Helena, MT 5920-1703